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HAROLD B. WILL

IN THE

Supreme Court of the United States

October Term, 1953

No. 469

FEDERAL POWER COMMISSION,
Petitioner,

vs.

NORTHERN NATURAL GAS COMPANY, et al.,
Respondent.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR NORTHERN NATURAL GAS COMPANY IN OPPOSITION

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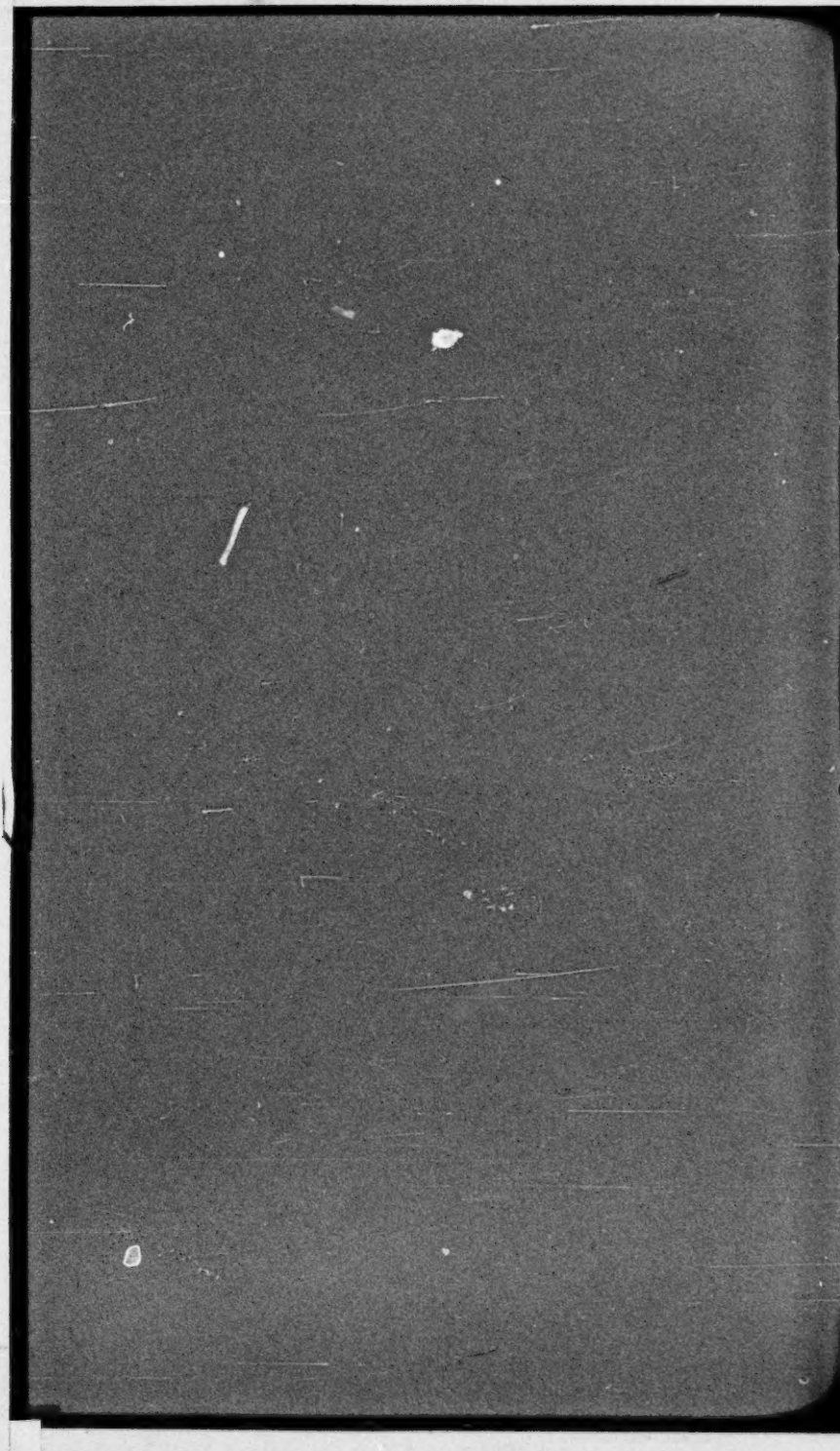

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OPINIONS BELOW

The Opinion and Order of the Federal Power Commission (R. V 2257-2314) is reported at 95 P.U.R. (N.S.) 289. The Opinion of the Court of Appeals (R. VI 2433-2497) is reported at 206 F. 2d 690.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Conditional Cross-Petition.

QUESTION PRESENTED

Whether a Court of Appeals, in reviewing an order of the Federal Power Commission under the Natural Gas Act, §19(b), may, in order to effectuate compliance with the Administrative Procedure Act, §8(b), remand a case to such Commission for additional findings and conclusions essential to adequate review of the issue of rate of return.

STATUTES INVOLVED

The pertinent provisions of the Administrative Procedure Act and the Natural Gas Act are set out in Appendix A, pp. 24-28, *infra*.

STATEMENT

A statement of the facts involved and of the proceedings before the Federal Power Commission and before the Court of Appeals is set out in Northern Natural Gas Company's Petition for Writ of Certiorari in No. 382 (Pet. No. 382, pp. 5-7), to which the Court is respectfully referred. The facts pertinent to the issue presented by the conditional cross-petition are set out below.

The Commission's opinion on the issue of the proper rate of return concludes in the following manner (R. V 2274):

> A 5½% rate of return would provide a return on Northern's common stock equity of 8.75% after an allowance of ½% to cover cost of financing, and which is after income taxes.

An 8.75% allowance for common equity with a 62.7% payout will result in a yield of 5.49%, which is in excess of average yields of the seven companies since 1945. We find, therefore, that a 5½% rate of return[1] for Northern is fair and reasonable.

The entire Commission opinion on the issue presented in the cross-petition covers approximately three printed pages in the record (R. V 2271-2274) and discusses only Respondent's capital structure and the historical cost of debt and equity capital, the latter as determined *solely* by comparative earnings-price ratios[2] and yields of the common stocks of several natural gas companies, including Respondent. As the Court below noted (R. VI 2491-2492) the Commission's opinion is devoid of any discussion, findings or conclusions disposing of (1) Petitioner's voluminous expert evidence, both oral and documentary, showing that "a 6% rate of return is the absolute minimum rate which would provide a return which would be 'just and reasonable,'" (2) the finding of the Presiding Examiner in his intermediate decision that "the rate of return of 6% is a fair and reasonable return which must be provided for Northern upon the present state of the record," (3) the testimony of the Commission's Staff Witness that in his opinion "a rate of return of 6 percent would allow the Company to attract capital" and whose only qualification of this position was that "5¾% *might* be adequate" [emphasis supplied], and (4) the fact that no witness testified that a rate of return as low as 5½% would be adequate.

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1 The Commission in its cross-petition (Pet. No. 469, p. 3) states that this 5½% rate of return is to be applied to "Northern's rate base of about $140,000,000." This statement is erroneous. Respondent's rate base, as calculated by the Commission, is $129,945,031 (R. V 2271).

2 The ratio of past earnings to current market price.

The Court below found, "Aside from the statement that the Commission 'examined all of the available evidence of record,'[3] the finding that a 5½% rate of return will produce a fair and reasonable 'end result' seems to rest solely on the comparison of investors' appraisals of the common stocks of seven natural gas companies" (R. VI 2485). The Court then discussed Federal Power Commission findings and conclusions in earlier rate cases, and the decisions of this Court upholding the Commission decisions in such cases (R. VI 2486-2489) and concluded, "The Supreme Court makes it clear that there are considerations beyond that of the yield to investor[s]", citing *Federal Power Commission v. Hope Natural Gas Company,* 320 U. S. 591, 603 (1944) (R. VI 2489).

The Court below, having no desire to substitute its judgment for that of the Commission,[4] concluded "that this case must be remanded to the Commission with direction to set out more fully and particularly the facts and the reasons bearing on its decison as to the rate of return" (R. VI 2490), and stated (R. VI 2492-2493):

> A mere assertion that the Commission has examined "all of the available evidence of record on this subject" does not suffice to show this court, on review, that the conclusion of the Commission as to the rate of return is the result of the application of the Com-

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3 On this point, see **Beaumont, S. L. & W. Ry. Co. v United States,** 282 U. S. 74, 86 (1930), where it is stated: "The general statements in the reports to the effect that the Commission, in reaching its conclusions, considered all the pertinent evidence, add nothing to the prima facie presumption that generally attends determinations of the Commission." (Footnote supplied)

4 "We have no desire to substitute our judgment for that of the Commission, and therefore we have no occasion to set out what we feel would be a fair rate of return. **What is of importance is that we are unable from the reported findings to arrive at a reasoned conclusion that the 5½% rate of return allowed by the Commission is 'just and reasonable.'"** (R. VI 2490.) (Emphasis supplied)

mission's expertise and judgment so that we would affirm.[5] The Administrative Procedure Act, 60 Stat. 237, 5 U.S.C.A. §1001, et seq., is applicable to determinations made by the Federal Power Commission, and that Act provides (5 U. S. C. A. §1007(b)): "All decisions * * * shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; * * *." Whether the "end result" is just and reasonable we cannot say, since we do not know the findings and reasoning of the Commission except as to the rate of yield, and therefore we do not feel that the Commission's decision on the rate of return should be affirmed. Not only does the 5½% rate allowed appear to be the lowest ever allowed by the Commission, but the Presiding Examiner's finding and the testimony of the Commission's own expert rate-of-return witness militate against it.

The case must be remanded to the Commission with direction to make additional findings and conclusions upon its determination of the issue of Rate of Return, including its reasons and basis therefor so as to comply with the requirements of 5 U. S. C. A. §1007(b).

It is an important fact to note that although the decision of the Court below is based upon the Administrative Procedure Act, the Federal Power Commission makes absolutely no reference to such Act in its conditional cross-petition.

The fact that the Commission totally ignores the basis of the decision of the Court below in presenting the question to this Court, makes the "Question Presented", as framed in the Petition (Pet. No. 469, p. 2), wholly inapplicable to the instant case and results in asking this Court to review a question irrelevant to the decision below.

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5 See footnote 3, supra.

ARGUMENT

I.

THE QUESTION PRESENTED IS NOT ONE APPROPRIATE FOR REVIEW BY THIS COURT

a. The Court Below Determined Only a Procedural Matter Which Is Neither a Final Order on the Merits nor Fundamental to the Further Conduct of the Case.

Petitioner misconceives the problem presented by the ruling of the Court of Appeals on the issue of rate of return. In its cross-petition, the Commission argues at great length the question of substantiality of evidence.[6] To do so is to discuss a question that the Court below has not yet reached, although Respondent contended vigorously before the Commission and before the Court of Appeals and still contends that there is *not* substantial evidence in the record to support a determination of a 5½% rate of return. The necessary inference to be drawn from the opinion of the Court below is that it has not and could not yet consider the question of substantiality of the evidence because the findings made by the Commission were so inadequate. It is imperative to keep in mind that the *real* question presented concerns the authority of the Court below to remand the Commission Opinion for findings and conclusions, as well as the reasons or basis therefor, to effectuate compliance with the Admin-

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6 With respect to substantiality of evidence it is of interest to note, as did the Court below (R. VI 2492), that no witness in this proceeding, expert or otherwise, for the Commission or for the Respondent, testified to or recommended a rate of return as low as 5½%, and that the Presiding Examiner found that a 6% rate of return was reasonable (R. VI 2491). That the hearing examiner's findings under the Administrative Procedure Act, §8(b), become a part of the record and must be considered on review was settled by **Universal Camera Corp. v. N. L. R. B.**, 340 U. S. 474, 492-497 (1951).

istrative Procedure Act, §8(b). See Appendix A, p. 26, *infra.*)[7] This question is one involving merely the procedural aspects of the Commission decision. The Court of Appeals has ordered the Federal Power Commission to fulfill its duty under the Administrative Procedure Act, §8(b), in order that the Court may properly discharge its obligation of review under that same Act, §10(e) and under the Natural Gas Act, §19(b). (See Appendix A, pp. 27, 24-25, *infra.*)

In view of these circumstances the cross-petition should be denied. Since the Court of Appeals has not yet passed upon the question of substantiality of evidence and rendered a final judgment, orderly judicial administration would be abetted by denial of the cross-petition.

In several recent cases this Court has indicated that it does not review judgments that are not final, except where review involves an issue fundamental to the further conduct of the case—a situation which is not here present. (*Larson vs. Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 685 (1949); *Land vs. Dollar*, 330 U. S. 731, 734 (1947); *U. S. vs. General Motors Corp.*, 323 U. S. 373, 377 (1945)). In the case at bar the ruling of the Court of Appeals is certainly not finally dispositive

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7 Petitioner's misconception of the question is clearly indicated by its statement in footnote 4 on page 8 of the Petition in No. 469. There Petitioner states: "The financial data did not disclose that Northern was subject to any particular vulnerability. Nor was any claim made to that effect. As a matter of fact, Northern's gas reserves are somewhat larger than those of comparable natural-gas companies (R. IV 1918). And the low interest rate it pays on its long-term indebtedness also attests to its financial health (cf. R. IV 1715-1731)." What is of interest in the foregoing statement is that **no such findings or conclusions were made, much less statements of the reasons or bases therefor,** in the Federal Power Commission's opinion and order. Petitioner is now attempting to make findings **post hoc** in its Petition in this Court in an effort to support its order.

of the case and it clearly is not a ruling which is fundamental to further proceedings. Such ruling does not relate to a jurisdictional or substantive matter. Rather it is a procedural ruling, the fulfillment of which is necessarily precedent to the Court of Appeals' consideration and disposition of the substantive question of substantiality of evidence.

The Court below has merely attempted to enforce orderly procedure in an administrative action as required by the Administrative Procedure Act, §8(b). If certiorari is to be granted on such issues it will defeat the very purpose of the Administrative Procedure Act imposing on Courts of Appeals reviewing under Section 19(b) of the Natural Gas Act, the responsibility of keeping administrative bodies, such as the Federal Power Commission, within reasonable bounds (cf. *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 489-490).

In furtherance of proper judicial administration and in consideration of the inter-relationship of the federal appellate courts and their respective functions, this Court should deny the conditional cross-petition for certiorari.

b. The Action of the Court Below in Remanding for Compliance with the Administrative Procedure Act, §8(b), is Within the Normal and Primary Responsibility of Courts of Appeals Under the Administrative Procedure Act, the Natural Gas Act and the Decisions of This Court.

The "exclusive jurisdiction" given Courts of Appeals on petitions for review of Federal Power Commission orders (Natural Gas Act, §19(b)) should operate as a conclusive deterrent to granting this cross-petition for certiorari. Keeping in mind the fact that the Court of

Appeals "has not reversed the conclusions of the Commission, except in the procedural sense necessary to a remand,"[8] we direct attention to the review provisions of the Natural Gas Act, Section 19(b) (52 Stat. 831, 15 U. S. C. §717r(b)), which provides in part:

> Upon the filing of such transcript [of the record before the Commission] such court [of Appeals] shall have *exclusive jurisdiction* to affirm, modify, or set aside such order in whole or in part. * * * The judgment and decree of the court, affirming, modifying, or setting aside in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification * * *. (Emphasis supplied)

Such portion of the Natural Gas Act is analogous to the portions of the Taft-Hartley Act (§10(e), 61 Stat. 148, 29 U.S.C. (Supp. III) §160(e)) quoted in *N. L. R. B. vs. Pittsburgh S. S. Co.*, 340 U. S. 498, 502 (1951), as follows:

> The jurisdiction of the court [of Appeals] shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari * * *.

In the *Pittsburgh Steamship* case, the issue discussed was the substantiality of evidence—a substantive matter as distinguished from the procedural remand for additional findings here involved. In that case, after setting out the review provisions of the Taft-Hartley Act, supra, the Court stated (340 U.S. 502):

> * * * Congress has charged the Courts of Appeals and not this Court with the normal and primary re-

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8 See Mississippi River Fuel Corp. v. F. P. C. (C. A. D. C.), 163 F. 2d 433, 452 (1947).

> sponsibility for granting or denying enforcement of Labor Board orders. * * * Certiorari is granted only "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority[9] between the Circuit Courts of Appeals."

Certainly, there are no "principles the settlement of which is of importance to the public" involved in the remand for additional findings in the instant case. If review of such rulings by Courts of Appeals is to be granted, this Court will not be permitting those Courts to exercise the "exclusive jurisdiction" provided for by Section 19(b) of the Natural Gas Act and to assume the responsibility placed on such Courts by the Administrative Procedure Act and the decisions of this Court. As this Court stated (again with reference to the substantiality of evidence) in *Universal Camera Corp. vs. N. L. R. B.*, 340 U. S. 474, 489-490:

> Some scope for judicial discretion in applying the formula [for judicial review of administrative action] can be avoided only by falsifying the actual processes of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work. * * *
>
> We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. *Reviewing courts must be influenced by a feeling that they are*

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9 On this point, see pp. 12-18, infra.

> *not to abdicate the conventional judicial function.* Congress has imposed on *them* responsibility for assuring that the Board keeps within reasonable grounds (Emphasis supplied).

Exactly the same criterion must be applied to review by Courts of Appeals of Federal Power Commission orders under the Natural Gas Act. Congress, through the Administrative Procedure Act, has ordered administrative agencies to make findings and conclusions, and to state the reasons or basis therefor, and a Court of Appeals under the Natural Gas Act has the responsibility to enforce that Congressional mandate.

It is most difficult for a reviewing court to fairly and accurately appraise the substantiality of evidence, and before undertaking that difficult task (which is peculiarly within their province) it is eminently proper that the court have the benefit of adequate findings, conclusions and reasons from the administrative agency on all material issues of law, fact and discretion. The Court below has not required, as stated by the Federal Power Commission (Pet. No. 469, p. 10), that the Commission order be "based on reasoning acceptable to the court." Such Court has simply held that the Commission order must comply with the requirements of the Administrative Procedure Act, §8(b). In so doing the Court of Appeals has followed precisely the dictates of this Court where, in *Colorado-Wyoming Gas Co. v. F. P. C.*, 324 U. S. 626, 634 (1945), Mr. Justice Douglas, speaking for the Court, stated:

> Sec. 19(b), 15 U.S.C.A. §717r(b) says that the "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." But we must first know what the "finding" is before we can give it that conclusive weight. We have repeatedly

> emphasized the need for clarity and completeness in the basic or essential findings on which administrative orders rest. [Citing cases.] Their absence can only clog the administrative function and add to the delays in rate-making. We cannot dispense with them for Congress has provided the standards for judicial review under this Act. §19(b). *The courts cannot perform the function which Congress assigned to them in absence of adequate findings.* (Emphasis supplied)

The Federal Power Commission in effect takes the position that matters of a fair hearing, proper findings, and other statutory procedural requirements, may be ignored if the "end result" does not effect confiscation.[10] Such a contention is so contradictory of fundamental rights that it cannot be said to be proper.

c. The Decision of the Court Below Does Not Conflict With Decisions of Other Courts of Appeals.

1. Petitioner states (Pet. No. 469, pp. 16-17) that the decision below conflicts in principle (not directly) with the decision of the Court of Appeals for the District of Columbia in *Mississippi River Fuel Corp. vs. Federal Power Commission*, (C.A. D.C.), 163 F. 2d 433 (1947). It should be kept foremost in mind that the question in such case was the substantiality of evidence to *support the findings* on rate of return. In the instant case the Court below has not yet even reached the question of substantiality of evidence since it *found the Commission findings inadequate.*

An examination of the decision in the *Mississippi River Fuel* case discloses that the Court of Appeals for the District of Columbia not only does not disagree with

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10 See Question Presented, Pet. No. 469, p. 2.

the Eighth Circuit but instead *expressly agrees* that a Court of Appeals *can* and *must* test the adequacy of the findings made by the Federal Power Commission. In the *Mississippi River Fuel* case, 163 F. 2d 433, 436-437, the Court stated:

> Under the rule laid down by the Supreme Court in the Hope Natural Gas Company case, the court is restricted in its review of a Commission rate of return allowance to a test of the end result of the order, *and, of course, the adequacy of the findings* and the sufficiency of the evidence supporting the findings. (Emphasis supplied.)

Clearly there is no conflict in principle between the two circuits with respect to the question presented, namely, the authority of a Court of Appeals to remand a Federal Power Commission decision for additional findings.

Indeed, in its opinion denying Petition for Rehearing in the *Mississippi River Fuel* case (163 F. 2d 433, 450-452), the Court, in a blunt criticism of exactly the same Commission views as are expressed in the cross-petition in this case stated:

> The Commission says that a reviewing court is limited to a consideration of the "end result", the rate, or price, prescribed by the final rate order for the commodity or service. * * *
>
> The danger of misunderstanding and confusion arises because the Commission's premise stems from a trite and true generality. It is true that, if the rate prescribed by the Commission be fair, reasonable and non-confiscatory, a court cannot disturb it. The questions are: *When* is a rate fair, reasonable and non-confiscatory? And *how* does a court determine whether the rate is so or not? The Commission seems to contend that the court must examine the rate per se, as an abstraction, or as a naked economic fact, divorced from the elements of which it is composed

and regardless of its effects; and if it appears fair and reasonable upon such examination, it must stand. *Such contention is without merit, either upon reason or upon authority, and moreover is impossible of practice.* * * *

* * * the Commission, even though expert, is forbidden to be arbitrary. And the courts are directed to prevent it from being so. The Commission cannot, and we do not understand it to claim that it can, shield arbitrariness by averments of its own infallibility, by technical expressions *or by failure to state adequate reasons for its conclusions.* This court, in the present case, has not reversed the conclusions of the Commission, except in the *procedural sense necessary to a remand.* It has remanded the case for clarification where clarity is not present, and for completion where incompleteness now exists. When the findings and conclusions are *complete* and *clear,* the court will then, if appropriate proceedings are brought, consider whether the ultimate rulings of the Commission are within the permissible bounds of its power. The Commission says that the court has substituted its judgment for that of the Commission. The court has not done so. That contention in the present case is merely the recitation of a favorite cliche of administrative tribunals whose findings and conclusions have been queried by a court. (Emphasis supplied)

If the Commission is contending that the Court in the *Mississippi River Fuel* case sanctioned exactly the same kind of findings that were criticized in the instant case, an examination of the Commission decision in that case discloses patent substantial differences from the situation in the instant case in respect to the record and findings. In the *Mississippi River Fuel* case where the company was contending for a 6½% rate of return, the following facts existed:

1. Mississippi River Fuel "offered no evidence on rate of return" (63 P. U. R. (N. S.) 89, 98).[11]

2. There was no intermediate decision of a Presiding Examiner upholding the Company contention for a 6½% rate of return.[12]

3. The Company did not raise the question of insufficient findings on the issue of rate of return (163 F. 2d 89, 98).

In the instant case, where this Respondent is contending for a 6% rate of return, the following facts exist:

1. Comprehensive expert testimony, both oral and documentary, was offered by this Respondent showing that a 6% rate of return was the absolute minimum which would provide a just and reasonable return (R. II 625-752, 936-994, 1009-1163, 1169-1176; R. IV 1819-1968), of which there is no mention or disposition made in the Commission's opinion (R. VI 2491).

2. There was an intermediate decision of the Presiding Examiner upholding this Respondent's contention for a 6% rate of return (R. V 2255), of which there is no mention or disposition made in the Commission's opinion (R. VI 2491).

3. The question of insufficient findings was clearly raised by Respondent in its application for rehearing before the Commission (R. V 2366-2369) and in its petition for review in the Court below (R. I 20-25).

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11 The Court's statement that "the company introduced evidence upon the matter" of rate of return (163 F. 2d 436) is not compatible with the statement in the Commission's opinion that "the Company offered no evidence on rate of return" (63 P.U.R. (N.S.) 98). We accept the statement of the Commission as trier of the facts.

12 This action was commenced prior to the effective date of the Administrative Procedure Act and the proceedings were not subject to the provisions of such Act. See §12, 5 U.S.C. §1011 (Appendix A, pp. 27-28, infra).

In addition in the instant case, as the Court below found, the "Presiding Examiner's finding and the testimony of the Commission's own expert rate-of-return witness militate against" the Commission decision (R. VI 2492). Clearly, therefore, when considered in the light of the record facts in the respective cases, there is no conflict between the decision of the Court of Appeals (D. C.) in the *Mississippi River Fuel* case and the decision of the Court below in the instant case.

2. Petitioner also alleges that there is a conflict in principle (not directly) between the Eighth Circuit and the Tenth Circuit, as disclosed by a comparison of the opinion of the Court in the instant case with the opinion of the Tenth Circuit in *Colorado Interstate Gas Company vs. Federal Power Commission,* No. 4151, decided October 29, 1953.[12a] In that opinion, at p. 16 of the mimeographed copy distributed to this Court by Petitioner, the Court of Appeals stated:

> The late case of *State Corporation Commission of the State of Kansas v. Federal Power Commission* [the instant case], decided by the Eighth Circuit on July 20, 1953, in which the findings and order of the Commission were reversed and remanded in part for further consideration with respect to making additional findings, has been called to our attention. It is sufficient to say that in our opinion the two cases are distinguishable and that the *facts* in this case do not warrant similar treatment other than above indicated. (Emphasis supplied)

There is not the faintest indication in the Tenth Circuit decision that such Court disagreed with the decision of the Eighth Circuit in the instant case, holding that a reviewing Court of Appeals may remand a Fed-

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12a The 10th Circuit by Order issued Dec. 8, 1953, vacated its judgment and granted F. P. C.'s Petition for Rehearing. A like petition filed by Colorado Interstate on the rate of return issue is still pending.

eral Power Commission decision in an appropriate case, for adequate findings and conclusions to effectuate compliance with the Administrative Procedure Act, §8 (b). It is evident that the Court of Appeals for the Tenth Circuit felt that the case before it either did not present the same deficiency in findings, as did the case before the Eighth Circuit, or the question of adequate findings was not properly preserved or presented. If one does not assume, as does the Federal Power Commission, that the Court of Appeals for the Tenth Circuit does not know what it is saying when it states that the two cases are distinguishable, an examination of the decisions reviewed discloses differences in the two cases.

The Federal Power Commission opinion in the *Colorado Interstate* case, 95 P. U. R. (N. S) 97, 112-114, contains a discussion of the testimony of Colorado Interstate's rate-of-return witness and a statement of the reasons why the Commission did not accept that witness's testimony. In the instant case the Commission did not even attempt to discuss, explain away or dispose of the comprehensive expert evidence presented by Respondent's rate-of-return witness showing that a 6% rate of return was the absolute minimum that would provide a just and reasonable return to Respondent (R. VI 2491), and the finding of the Presiding Examiner that a 6% rate of return must be provided for Respondent (R. VI 2491).

Further, the Commission, in its Opinion No. 235-A, denying rehearing in the *Colorado Interstate* case, Docket No. G-1115, states (Mimeo. Ed., p. 4):

> Colorado attacks our allowance of a 5.75% rate of return contending that:
>
> (1) We did not allow present cost of debt capital but, instead, used an historical rate of 3.21%;
>
> (2) We did not allow that extra "fillip" as Colo-

rado puts it which is necessary to attract money in the future; and

(3) In determining the reasonable cost of common stock capital we erred in applying earnings-price ratios in relation to the book value of the common stock.

The question of compliance with the Administrative Procedure Act, §8(b), was evidently not raised before the Commission on application for rehearing, and, therefore, the Court of Appeals could not consider that particular objection when reviewing the case.[13] There can no longer be any doubt that procedural rights under the Administrative Procedure Act can be waived. *United States, et al. v. L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33 (1952).

There is no conflict in principle on the issue of rate of return, as alleged by Petitioner (Pet. No. 469, pp. 16-18), between the decision of Eighth Circuit below and the decision of Court of Appeals, District of Columbia and Court of Appeals, Tenth Circuit in the *Mississippi River Fuel* and *Colorado Interstate* cases, respectively.

II.

THE DECISION OF THE COURT BELOW IS CLEARLY CORRECT

Petitioner also argues that the findings the Commission made "were adequate to support its conclusion" (Pet. No. 469, pp. 11-13). The question as presented to

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13 "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so." Natural Gas Act, §19(b); 15 U.S.C. §717r(b).

this Court by the Federal Power Commission (Pet. No. 469, p. 2) is not premised on and disregards the adequacy or inadequacy of the findings made. As presented in the cross-petition the same question would be before this Court if *no* findings were made so long as the rate of return fixed was alleged to be "based upon substantial financial data."[14] This in turn means—since §8(b) of the Administrative Procedure Act unequivocally directs that decisions of administrative bodies include "findings and conclusions, as well as the reasons or basis therefor upon all material issues of fact, law or discretion presented on the record"— that Petitioner, in order to make its argument germane to its "Question Presented," *must* contend that such Act does not apply to it. The definition of "Agency" in Section 2(a) of the Administrative Procedure Act (60 Stat. 918, 5 U. S. C. §1001(a), as amended)[15] clearly includes the Federal Power Commission. The Court below so held (R. VI 2492).

Although the issue as to the adequacy of findings is not determinative of the Question Presented, there can be no doubt that the findings were inadequate. There were absolutely no findings or conclusions other than the arithmetical calculations that the rate of return allowed would permit an allowance of "8.75% for common equity" which would "result in a yield of 5.49%, which is in excess of average yields of the seven companies since 1945" (R. V 2274). According to the decided cases, the Federal Power Commission is to exercise its expert judgment

14 The Question Presented assumes that the order of the Federal Power Commission was based upon substantial evidence ("substantial financial data"). Respondent repeats that this is a gratuitous assumption in that the Court of Appeals has not yet considered that question.

15 See Appendix A, pp. 25-26, infra.

—its expertise. See, e.g., *Bluefield Waterworks & Improvement Co. vs. Public Service Commission*, 262 U. S. 679, 692 (1923) (cited by the Commission in its opinion herein, R. V 2271), where it is stated:

> What annnal rate will constitute just compensation depends upon *many* circumstances, and must be determined by the exercise of a fair and enlightened judgment, having regard to *all* relevant facts. (Emphasis supplied)

If the exercise of that "fair and enlightened judgment" necessitates only elementary arithmetical calculations and a comparison of the answers obtained, then in reality no expert judgment is necessary. *Anyone* can be an "expert" in rate of return matters. Such an absurd result would strike at the very foundation and purpose in delegating authority to administrative agencies in the first instance, since such agencies are established to deal initially with problems too complex and intricate to be dealt with expeditiously by the courts.

That the decision of the Court below has had a most salutary effect on Federal Power Commission decisions is quickly shown by an examination of the Commission's Opinion No. 258, *In the Matter of United Fuel Gas Company*, Docket Nos. G-1781 and G-2055, decided after the decision in the Court below.[16] There the Commission in discussing its obligation to exercise a fair and enlightened judgment having regard to *all* relevant facts in determining rate of return said (Appendix B, p. 35, *infra*):

> This has recently been emphasized in the Opinion of the Court of Appeals for the Eighth Circuit, remanding to this Commission for further findings the determination that 5½%, in the circumstances of that

16 See Appendix B, pp. 29-37, infra.

case, constituted a fair rate of return for the Northern Natural Gas Company.[14]

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14 *State Corp. Comm. of the State of Kansas v. FPC* 14,704 and *Northern Natural Gas Company v. FPC*, 14,706, 14,733 and 14,743, CCA 8th (July 20, 1953). The Court said, "in the case under review we are not given any indication that the Commission has so exercised its practical, expert judgment. We are given instead a study that the Commission has made as to the rate of yield of various gas companies. * * * [R. VI 2489]

A comparison of that opinion on the issue of rate of return with the Commission's opinion in the instant case on the same issue (R. V 2271-2274) points out the glaring deficiencies of the latter. Clearly there are no "findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record" in the instant case that satisfy the requirements of the Administrative Procedure Act, §8(b).

The inadequacy of the Commission's findings and conclusions is pointed up in the opinion of the Court below where the Court lists four points on which it expresses dissatisfaction with the total lack of findings and supporting reasons disposing of record evidence. The Court found no mention or disposition in the Commission opinion of the following matters of record, as previously noted, p. 3, supra (R. VI 2491-2492):

(1) Petitioner's voluminous expert evidence, both oral and documentary, showing that "a 6% rate of return is the absolute minimum rate which would provide a return which would be 'just and reasonable' ";

(2) The finding of the Presiding Examiner in his intermediate decision that "the rate of return of 6% is a fair and reasonable return which must be pro-

vided for Northern upon the present state of the record";

(3) The testimony of the Commission's Staff Witness that in his opinion "a rate of return of 6 percent would allow the Company to attract capital" and whose only qualification of his position was that "5¾% *might* be adequate" [emphasis supplied]; and,

(4) The fact that no witness testified that a rate of return as low as 5½% would be adequate.

Where a Court of Appeals reviewing a Federal Power Commission decision under the provisions of the Natural Gas Act, §19(b) and the Administrative Procedure Act, §8(b), on a factual situation such as presented to the Court below, finds no expression concerning or disposing of factual matters such as those set out above, it cannot be denied that such a Court of Appeals has acted properly and within the scope of Congressional mandates providing standards for review, when it remands such a case to the Commission for further findings and conclusions.

Respondent submits that the decision of the Court below on the facts in the instant case is clearly correct.

CONCLUSION

The decision below is clearly correct to the extent that it has been attacked by the Federal Power Commission in its Cross-Petition in No. 469. The Court below, in the proper exercise of its reviewing powers under the Natural Gas Act, has remanded the case and ordered the Commission to comply with the Administrative Procedure Act, §8(b). There is no conflict of decisions and no occasion for this Court to review this procedural matter and thereby disrupt the administrative-judicial relations of the Federal Power Commission and the Court of Appeals as established by Congressional mandate. The question presented, besides being one which is not ripe for review since it is not finally dispositive of the issue, is certainly not a substantial federal question. The cross-petition for certiorari should be denied.

Respectfully submitted,

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December, 1953

APPENDIX A

Natural Gas Act

[Act of Congress of June 21, 1938, c. 556, 52 Stat. 821-833; 15 U. S. C. §717-717w; as amended.]

• • •

Section 19. *Rehearing; Court Review of Orders*

• • •

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and

that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C. title 28, secs. 346 and 347). [52 Stat. (1938); 15 U. S. C. 717r(b) (1946)]

Administrative Procedure Act

[Act of Congress of June 11, 1946, c. 324, 60 Stat. 237-244; 5 U. S. C. §§1001-1011; as amended]

* * *

Sec. 2. As used in this Act—

(a) *Agency.*—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives

of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944.

* * *

Section 8. *Initial decisions; conclusiveness; review by agency; submission by parties; contents of decisions; record*

* * *

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. [60 Stat. 242; 5 U. S. C. §1007(b)]

* * *

Section 10. *Judicial review of agency action*

* * *

Scope of Review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of any agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. [60 Stat. 243; 5 U. S. C. §1009(e)]

* * *

Section 12. *Impairment of rights; effect on other laws; separability; subsequent legislation; effective date*

Nothing in this chapter shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law,

all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this chapter or the application thereof is held invalid, the remainder of this chapter or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this chapter through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly. This chapter shall take effect three months after its approval except that sections 1006 and 1007 of this title shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 1010 of this title shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement. [60 Stat. 244, 5 U. S. C. §1011.]

APPENDIX B

Excerpts (pp. 24-32) from mimeographed edition of Federal Power Commission's Opinion No. 258, In the Matter of United Fuel Gas Company, Dockets No. G-1781 and G-2055, issued August 7, 1953.

Rate of Return

Columbia owns virtually all the outstanding securities, debt and equity of United. The minority interest amounts to 4/1000 of one per cent of the common. With this exception, everything which United earns accrues to Columbia. According to the record United's capital as of September 30, 1952, amounted to $108,344,438 and was composed of 48% debt and 52% equity. Debt included $21,825,000 of 6% Demand Notes which, according to testimony, are "frozen" by reason of tax considerations, although the effective interest rate thereon has been reduced to 3¼ per cent. Current debt financing is by means of Installment Promissory Notes and Short-Term Loans of which there was an aggregate of $30,162,000 outstanding as of the above date. Equity financing is accomplished by means of capital contributions from Columbia to United Fuel.

United Fuel claims that it is entitled to 6½ per cent rate of return on its total investment rate base. Its chief witnesses on rate of return were Mr. Francis H. Crissman, Treasurer of Columbia, and Dr. Ralph E. Badger, an economist.

Mr. Crissman claimed that a rate of return of at least 7% was required, basing his contention on a cost of money to Columbia of 6.83%. Dr. Badger concluded that a fair return for United would be between 7 and 7½%, and indicated that in arriving at this figure he had

included debt capital of Columbia at a replacement cost of 3.5% and equity capital at 11%. The latter rate, he said, had been selected after a study of the way in which the earnings of variously constituted groups of natural-gas companies had developed over the past decade.

Using a series of "growth factors" derived from these studies Badger projected earnings ten years ahead, averaged them and compared the averages with *current prices* for these companies' stocks, claiming that current prices discounted such growth. In this way he arrived at a series of earnings-price ratios from which he selected one which he thought suitable to United, and based his cost of equity capital on that.

Long range forecasts of this nature do not provide a sound and reliable basis for present decisions as to what is required to give United's parent company, Columbia, ready access to capital markets in order that it may keep United and its other subsidiaries supplied with capital funds. Also there is considerable doubt as to whether the stock market is this far sighted.

Mr. Crissman testified that the present debt capital of Columbia, consisting of debentures, had been obtained on a cost basis of 3.02%. To this 3.02% he would add 0.14%, representing annual amortization of debt discount, expenses and premiums relating to debt issues which have long since been retired and such items charged to earned surplus. As to this latter point, it is our opinion that the cost of getting rid of uneconomic debt is little different from expenses resulting from unexpected disasters, fires, hurricanes, transmission line breaks, or technological displacements such as the substitution of natural for manufactured gas in a utility's distribution sys-

tem. Such occurrences are among the risks inherent in the junior or equity stock position and they are properly chargeable against surplus as of the time they occur.

Mr. Crissman indicated that he believed the cost of equity capital to be taken into account should be 10.5%. He based this claim on Columbia's experience in disposing of its three post-war stock offerings; on the average relationship of Columbia's earnings to the market price for its stock since 1948, and on a ratio of dividends to earnings.[8]

The period from January 1, 1948, through 1952, has been significant for Columbia from a financial viewpoint, for in that interval it has sold all its presently outstanding debentures and thrice offered common stock to its stockholders on a subscription basis. As of the conclusion of these hearings the latest occasion on which it had made a stock offering was during November 1951 when 1,501,826 shares had been sold at $14.25 a share, which price was about 6.6% under the market. The net proceeds of this offering were $13.825 a share, or about 9.5% under the market, the market being about 15¼. The prevailing ratio of earnings to average market price during November, 1951, was 7.9%; the payout ratio visible at the time was 75.9%.

At oral argument in these proceedings United's counsel stated that a fourth offering of common stock had been made during May, 1953. This stock was sold to underwriters and the price which Columbia received there-

8 Mr. Crissman asserted that the historical "payout" ratio of Columbia had been about 65-70%. However, in the first eight months of 1952 payout had averaged 83.7% and in August, 1952, the last month for which information is of record, the payout had been 100%.

for, which was $12.65 a share, was determined by competitive bidding. Earnings at the time of this offering were 88 cents a share, the prevailing dividend rate was 90 cents a share, the earnings-bid price ratio was 6.9%, and the earnings-net proceeds ratio would be 7.2% if expenses were no greater than they were in 1951.[9]

Over the 1948-1952 period, which has been such a significant period in Columbia's development, the monthly earnings market price ratios of Columbia's common have ranged from a high of 12.9% in February, 1948, to a low of 6.3% in August, 1952. Over this four and a half year period these ratios have averaged 9.0%, the yield 6.2% and the payout 71%.

Over approximately the same period the monthly average earnings-price ratios of eight natural gas stocks which are listed on national security exchanges, as shown in the Staff's Exhibit,[10] have ranged from a high of 9.3% in June 1949, to a low of 6.0% in March, 1952. The average for their period was about 7.7%.

The monthly earnings-price ratios of three unlisted natural gas company stocks, appearing in the Staff's Exhibit[11] from January, 1949, through November, 1952, range

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9 The stock was reoffered to the public at $13.25 a share. The range of prices at which the stock had sold on the New York Stock Exchange between January 1, 1953, and April 28, 1953, was 15 high, 13 low. (Prospectus dated May 13, 1953).

10 These stocks are: Consolidated Gas Utilities Corp. common; El Paso Natural Gas Co. common; Lone Star Gas Co. common; Mississippi River Fuel Corp. common; Mountain Fuel Supply Co. common; Northern Natural Gas Co. common; Panhandle Eastern Pipe Line Co. common; and Southern Natural Gas Co. common.

11 These stocks are: Tennessee Gas Transmission Co. common; Texas Eastern Transmission Corp. common; and Texas Gas Transmission Co. common.

from a low of 6.0 early in 1950 to a high of 10.0 in May 1951, and stood at 7.0 for the last month of this period. The average for this period and these stocks was about 8 per cent. Since 1948 and through 1951 the yields on the eight listed and two unlisted stocks which were dividend payers in this period averaged somewhat under 5.0%; the payout ratios 50.0%. It would thus appear that Columbia Common runs at a somewhat greater relationship of earnings to market than either of these indices.

The Staff contends for an allowance to United Fuel of a rate of return of 6%, which it points out, would be the return to Columbia on its investment in United Fuel. If allowance be made out of this return for Columbia's own debt at 3.03%, assuming the proportion of debt to total capital to be 54.5%, the residual return on Columbia's equity on United Fuel would be at the rate of about 9.6%.[12] This, the Staff points out, would be sufficient to sustain a yield of 6.2% on Columbia's Common Stock, with a payout of 66⅔%, and would, it is contended, be generally consistent with the stock market's evaluation of Columbia's earnings and dividends over the 4½ years preceding August 1952.

This 6% rate of return, however, would make little or no allowance beyond the bare-bones cost of money to United Fuel and the Columbia System. Moreover, it would reflect a period during which money market conditions generally were relatively favorable for the sale of equity securities, and interest rates on senior securities were relatively low.

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12 United Fuel's return and Columbia's return on its investment in United Fuel 6.00%
Less allowance for Columbia's 54.5% debt at 3.03%..... 1.65%
Return to a 45.5% equity at 9.56%..... 4.35%

As the Supreme Court of the United States said in the Bluefield case:

> "Under the facts and circumstances indicated by the record, we think that a rate of return of 6 per cent . . . is substantially too low to constitute just compensation for the use of the property employed to render the service."[13]

We are, of course, concerned with rates for the future. Interest charges have lately risen perceptibly; whether the securities markets will continue at their present levels is a matter of uncertainty. Without clairvoyance in the matter, it would be less than responsible for us to resolve against Columbia all doubts respecting the course of the money markets over the next 18 months, during which period there is every indication that the system will be required to raise very substantial sums of additional capital for necessary expansion.

Furthermore, we must bear in mind the fact that, as the Supreme Court of the United States recognized as long ago as the *Bluefield* case:

> "What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of fair and enlightened judgment, having regard for all relevant facts. . . . The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties."[13a]

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13 **Bluefield Water Works & Improvement Co. v. Public Service Commission, 262 U. S. 679, 695 (1923).**

13a **262 U. S. 679, 692-693 (1923).**

We have never held that our responsibility for determination of the fair rate of return can be discharged properly through the mere application of a strict cost-of-money formula to produce the minimum return which might be nonconfiscatory; rather we must exercise a fair and enlightened judgment having regard for all relevant facts. This has recently been emphasized in the Opinion of the Court of Appeals for the Eighth Circuit, remanding to this Commission for further findings the determination that 5½%, in the circumstances of that case, constituted a fair rate of return for the Northern Natural Gas Company.[14]

Among other matters which we must consider are the essential nature of proceedings in which rates are fixed prospectively, the recent financial history and foreseeable new capital requirements of the particular company under consideration, and its relative position in comparison with other natural-gas systems whose rates recently have been, and are, before us,—for it is in the interest of investors and consumers alike that a healthy financial condition exists which will preserve investments made and assure the rendition of reasonably adequate service. It is necessary that we keep in mind the fact that, in disposing of questions regarding rates of return, we are dealing with a residual difference between two groups of estimates; estimates of revenues and estimates of costs of

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14 **State Corp. Comm. of the State of Kansas v. FPC, 14,704 and Northern Natural Gas Company v. FPC, 14,706, 14,733 and 14,743, CCA 8th (July 20, 1953).** The Court said, "in the case under review we are not given a[n] indication that the Commission has so exercised its practical, expert judgment. We are given instead a study that the Commission has made as to the rate of yield of various natural gas companies. . . . It is clear also that the Commission is not bound to the use of any particular formula or group of formulae in determining what is a just and reasonable rate." (Advance Ed., p. 60).

service exclusive of return. If actual revenues received or actual operating expenses incurred should deviate from our estimates in only small degree, the resulting effect on return could be very considerable. This, of course, might be to the advantage or to the disadvantage of any given company. However, consideration of Columbia's somewhat unsatisfactory recent financial record, as well as its large and imminent capital requirements, make it doubly necessary to avoid unintentionally restricting earnings by undue reliance on the accuracy of our estimates of revenues and expenses.

Turning to the financial situation of the Columbia System, earnings per share on its stock have shown a marked tendency to decline during the past several years. Dividend coverage has been limited, and the market value of the shares has been reduced at times to a figure below the actual investment represented thereby. Thus, Columbia's offering of 1,700,000 shares of Common Stock early in May 1953 netted the company only $12.57 per share as compared wtih a book value, as of April 30, 1953, of $13.18; and maintenance of the established 90c dividend has resulted in a payout of more than 100% of net earnings per share for the calendar year 1952 and for 1953 to date, with no indication that this situation will be improved during the full calendar year.

Of course, we have no responsibility to insure any particular dividend rate. It is, however, a cardinal principle of regulation that the return should be sufficient to attract capital—which it is evident that the Columbia System will need in large amounts in the early future if it is to approach a satisfaction of the requirements of its customers for natural gas. In the circumstances here prevailing, that principle seems to us to mean a con-

servative capitalization, a not inefficient pattern of operation, and an income over-all sufficient to attract capital on relatively favorable terms.

Columbia has resisted the lure of an undue thinning of the equity and has maintained a conservative capital structure. Return should be sufficient to encourage continuation of this practice. Moreover, our responsibility to encourage necessary expansion of facilities for the purpose of rendering adequate service is no less than our responsibility to insure that service be supplied at reasonable rates. A return limited to the bare cost of money will not encourage conservative financial practices nor will it encourage adequate enlargement of service facilities. While a return equal only to the strict historical cost of capital may be legally defensible as nonconfiscatory, it seems evident, in the circumstances of this case, that 6% would exceed the cost of capital by so little, if at all, as to be less than reasonable. We conclude, therefore, that a rate of return of 6¼% is fair and reasonable in this instance.